

QUESTIONS & ANSWERS from Jeaneanne Gettle, U.S. EPA

What does Florida need to assume a 404 program?

- State or tribal programs must be **consistent with and no less stringent** than the Clean Water Act and implementing regulations. They must:
 - Have equivalent scope of jurisdiction
 - Regulate at least the same activities
 - Provide for sufficient public notice & allow public participation
 - Ensure compliance with the CWA 404(b)(1) Guidelines (*regulations* at 40 CFR Part 230)
 - Have adequate enforcement authority
- The elements of a **formal request** are described at 40 CFR Section 233.10, and include:
 - Letter from Governor formally requesting assumption
 - Complete program description – scope & structure of the program
 - Attorney General statement describing state's authority to administer a program
 - Copies of all applicable state statutes and regulations for administering the program
 - MOA with EPA Regional Administrator
 - MOA with the Corps of Engineers
 - Description of waters that are not assumed by the state (retained by Corps)

Where is DEP in the process of negotiations with EPA/Corps/Services?

- EPA and Florida DEP have been meeting regularly regarding Florida's interest in assuming a 404 program for over a year now, discussing requirements that must be met for a program to be approvable, reviewing draft documents, discussing structure of regulations, etc.
- Florida has passed legislation for administering a 404 program, and has proposed regulations to establish critical program elements.

Where does the **Memorandum of Agreement** between EPA and FDEP stand?

- The MOA is a key piece of the state's request to assume administration of a 404 program, and is required by the regulations governing assumption.
- EPA and FDEP have discussed key components of the MOA.
- We will sign it closer to when Florida submits their request so that any additional issues that may arise can be addressed and incorporated.

Does EPA provide **funding** for assumed programs?

- EPA does not provide any *specific* funding for assumed 404 programs.
- In fact, the regulations governing assumption require that a state demonstrate—as part of its request—that it has the resources and capacity to administer the proposed program, including funding, workforce, and permitting and enforcement capacity.
- States can choose to direct funding from CWA Section 106 grants (for water quality efforts) and Wetland Program Development Grants to an assumed program, but there are not pots of additional funding dedicated to assumed programs.

How likely is EPA approval of Florida's request to assume a 404 program?

- EPA's decision on program approval will be made after receiving and reviewing the formal request and submission package from Florida, and after consideration of public and agency comments concerning whether the program meets the requirements of the Clean Water Act and regulations governing assumption.

- I can say that coordination to date has demonstrated DEP's seriousness and diligence in working towards a program that meets regulatory requirements.

Can a tribe assume administration of a 404 program?

- Yes, a federally recognized tribe can assume a 404 program, subject to the regulatory requirements of 40 CFR Part 233.

Does EPA **consult with tribes** in a state requesting 404 assumption?

- Yes, EPA has a duty to consult with federally recognized tribes in a state, or with waters that may be affected by activities in a state, requesting assumption.

What **other states** have assumed 404 programs?

- To date, Michigan (1984) & New Jersey (1994) have assumed 404 programs

What does the **review & approval process** look like?

- Once a state submits a formal request to assume administration of a 404 program, EPA has 30 days to determine whether the package is complete.
- The total review period is 120 days, and includes:
 - Sharing the request package with the Corps, US Fish & Wildlife, and National Marine Fisheries Service to solicit their comments
 - EPA review for consistency with Act and regulations
 - Solicit public comment - notice published in FR and newspapers
 - Public hearing(s) and 45-day comment period
 - EPA prepares a responsiveness summary to public comments
 - Tribal Consultation

Is there any **federal oversight** of a state's program after assumption?

- States are required to share with EPA notices of certain proposed projects for which EPA has not waived federal review.
 - There are six categories required by regulation:
 - Draft general permits
 - Discharges w/reasonable potential for affecting T&E species (ESA)
 - Discharges that may adversely impact waters of another state or tribe
 - Discharges with known or suspected toxic or hazardous pollutants
 - Discharges in proximity to public water supply intakes
 - Discharges within critical state/federal areas (e.g., parks, refuges, monuments)
 - EPA must share notices of projects in these categories with the Corps and Services (USFWS, NMFS).
 - EPA can object to or require conditions for permits.
 - EPA has the option to review other projects, as well.
- A state is the primary **enforcement** authority for an assumed program.
- EPA does retain independent enforcement authority.
- Coordination of enforcement activities is spelled out in the MOA between the state and EPA.